Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area	WC Docket No. 05-281

REPLY COMMENTS OF VERIZON ON ACS'S PETITION FOR FORBEARANCE

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I. SUMMARY

The evidence presented by ACS of Anchorage, Inc. ("ACS") sets forth an overwhelming case in support of its request for forbearance from the requirements of § 251(c)(3) and § 252(d)(1) in the Anchorage LEC Study Area ("Anchorage"). While Verizon takes no position on the claims of the various carriers operating in Alaska that support or dispute the factual evidence that ACS has provided, it remains the case that ACS's showing, if sustained, goes far beyond what could be necessary to satisfy the requirements of § 160. As Verizon has explained, forbearance is warranted well before an incumbent local exchange carrier has lost more than 50 percent of its market share. *See* Verizon at 2-5. Any other result would be inconsistent with the applicable statutory standards.

A number of commenters with no operations in Anchorage or elsewhere in Alaska also oppose ACS's petition. These commenters, however, are not concerned with the facts on the ground in Anchorage. Instead, they seek to raise insurmountable obstacles to forbearance petitions that might be filed in the future, with respect to the areas in which they do operate. As shown below, their claims are incompatible not only with the text of § 160 and this

Commission's prior determinations, but also with the purpose of § 160 and its role in furthering the goals of the 1996 Act. Forbearance is, as the Commission has repeatedly recognized, an "*integral part*" of the "pro-competitive, de-regulatory national policy framework" established in the 1996 Act,[1] not an evasion of the Act's commands as some commenters imply.

Nonetheless, several commenters incorrectly assert that the Commission cannot forbear from the § 251(c)(3) unbundling requirements absent a finding of no impairment. But this claim impermissibly reads the Commission's forbearance authority out of the 1996 Act as to § 251(c)(3), because once the Commission finds that no impairment exists, it may no longer require unbundling under § 251(c)(3) itself and, therefore, would have no need to forbear from enforcing that section. In § 160, however, Congress provided the Commission with a mandate to forbear from enforcing *existing* requirements where competitive conditions warrant, and in particular, recognized expressly that forbearance could apply to obligations under § 251(c).

These commenters are also wrong to argue that the Commission cannot grant forbearance from the enforcement of § 251(c)(3) if forbearance would result in rates above TELRIC prices. As an initial matter, the commenters' focus on wholesale purchasers is misplaced, because the intended beneficiaries of the 1996 Act in general — and § 160 in particular — are consumers, not particular competitors. Therefore, any alleged effect that forbearance might have on wholesale terms to other carriers is relevant only if it will affects retail competition and the prices paid by consumers, which will not occur where competition exists. In any event, nothing in

[1] Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, ¶ 11 (2004) ("*271 Broadband Forbearance Order*") (emphasis added) (internal quotation marks omitted), *petition for review filed*, *Earthlink, Inc. v. FCC*, No. 05-1087 (D.C. Cir.); accord Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, FCC 05-170, WC Docket No. 04-223, ¶ 13 (rel. Dec. 2, 2005) ("*Qwest Omaha Forbearance Order*"), *petitions for review filed*, *Qwest Corp. v. FCC*, Nos. 05-1450 *et al.* (D.C. Cir.).

§ 160 requires that rates remain precisely at regulated levels following forbearance. Instead, Congress directed the Commission to forbear where regulation is not "necessary to ensure" just and reasonable rates. 47 U.S.C. § 160(a)(1). And the Commission and the D.C. Circuit have made clear that, outside the limited context of § 251(c)(3), the statutory "just and reasonable" standard is not TELRIC.

Commenters' arguments that forbearance cannot be granted from § 251(c)(3) unless § 271 obligations exist as a "fallback" similarly read limitations into § 160 that cannot be found in the provision itself. Congress imposed only one limitation on granting forbearance from § 251 in those cases where the factors in § 160(a) are satisfied; there is no basis in the statute for imposing an additional bar, particularly where the limit these commenters propose would preclude the Commission from ever forbearing from enforcing § 251(c)(3) with respect to *non*-BOCs. As the Commission has recognized, the 1996 Act places greater requirements on BOCs than on other ILECs, and there is no reason to believe that Congress took the opposite approach in § 160.

Finally, the Commission held squarely in the *Qwest Omaha Forbearance Order* that § 160(d) poses no bar to a petition for forbearance under § 251(c)(3) because that section "is 'fully implemented' for all incumbent LECs nationwide."[2] A number of commenters, however, seek to have the Commission reverse its determination, but the proper way to raise such claims before the Commission would have been in petitions for reconsideration of the *Qwest Omaha Forbearance Order* itself. None of these commenters (or any other carriers) did so. In any event, their arguments are unavailing. The Commission's decision is consistent with the text of § 160(d) and § 251(d)(1), and the commenters' arguments to the contrary are thinly disguised

[2] *Qwest Omaha Forbearance Order* ¶ 53.

attempts to prevent the Commission from ever granting forbearance from the enforcement of § 251, which is contrary to the text of § 160 and Congress's intent.

II. IN GRANTING ACS'S PETITION, THE COMMISSION SHOULD REJECT THE VARIOUS OBSTACLES TO FORBEARANCE POSITED BY COMMENTERS BECAUSE THEY ARE INCONSISTENT WITH THE TEXT AND PURPOSE OF § 160 AND COMMISSION PRECEDENT

As Verizon has explained, on the evidence presented in ACS's petition, the Commission should conclude, consistent with its decision in the *Qwest Omaha Forbearance Order*, that ACS's showing here has far exceeded that necessary to obtain a grant of forbearance. *See* Verizon at 2-5; *cf. Qwest Omaha Forbearance Order* ¶ 2 (explaining that the Commission did not adopt "rules of general applicability"). As both the Commission and the courts have recognized, "excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology."[3] This is because "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[4] Unbundling creates disincentives for investment and deployment by imposing on incumbents numerous costs, including "diminish[ed] . . . compensation," the "costs of constructing . . . facilities . . . that will allow the . . . satisf[action] [of] whatever access requirements might foreseeably be imposed," and "the significant costs that can be associated with regulatory

[3] *E.g.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 3 (2003) ("*Triennial Review Order*"), *vacated in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

[4] *United States Telecom. Assn. v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428-29 (1999) (Breyer, J., concurring in part and dissenting in part).

proceedings themselves."[5] ACS's petition provides the Commission with an opportunity to reinforce the determination that mandatory unbundling undermines the goals of the 1996 Act. In doing so, the Commission should state definitively that forbearance is appropriate long before a competitor has captured 50 percent of the market in an area.

As described above, numerous competitors attempt to raise legal obstacles not only to ACS's petition, but also to future petitions for forbearance, in a transparent attempt to preclude the use of § 160 as a means for eliminating unbundling obligations imposed under § 251(c)(3). For the reasons set forth below, the Commission should reject these claims, which are inconsistent with the text and purpose of § 160, as well as this Commission's precedent.

A. Forbearance from § 251(c)(3) Does Not Require a Finding of No Impairment

As the Commission held in the *Qwest Omaha Forbearance Order*, § 160 sets forth its own standards, which are separate from the standards set forth in § 252(d)(1) for determining whether the Commission may order unbundling under § 251(c)(3) in the first place. The Commission has expressly and correctly "reject[ed] commenters' proposals that [it] interpret and apply the section 251(c)(3) impairment standard . . . to [the] forbearance analysis." *Qwest Omaha Forbearance Order* ¶ 14 n.48. As the Commission explained, its "unbundling analysis does not bind [its] forbearance review." *Id.* ¶ 63. Instead, the Commission's "sole task," in the context of a petition for forbearance from the requirements of § 251(c)(3), is "to determine whether to forbear under the standard of section 10," and the Commission does not "issue comprehensive proclamations . . . regarding . . . non-impairment" in such a proceeding. *Id.* ¶ 14; *see also id.* ¶ 67 n.177 (explaining that, in reviewing a forbearance petition, the Commission is

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[5] *271 Broadband Forbearance Order* ¶ 25.

not "making national impairment findings," but instead is "applying the statutory standards of section 10 in a specific geographic market").

Commenters that argue that the Commission must conduct an impairment analysis in deciding whether to forbear from enforcing § 251(c)(3) as to elements for which the Commission has found impairment address none of this. *See* Time Warner Telecom at 4-11; *see also* GCI at 59-62. The Commission, however, is plainly correct that, as a matter of basic statutory interpretation, Congress established different standards for determining whether network elements must be provided as under § 251(c)(3) — in § 252(d)(1) — and for determining whether to forbear from all statutory and regulatory requirements — in § 160(a) and (b). As the Commission properly recognized in the *Qwest Omaha Forbearance Order*, there is no basis for reading the § 251(d)(2) standard into § 160, when Congress expressly established an independent test for forbearance.[6]

The argument that the Commission must conduct an impairment analysis in determining whether to forbear from enforcing § 251(c)(3) is logically indistinguishable from the equally erroneous argument, advanced by other commenters, that the Commission cannot grant forbearance from § 251(c)(3) if impairment still exists. *See* Covad at 6-9; Nuvox at 35-37. Such a proposition not only is incompatible with the express standards Congress established in § 160, but also impermissibly reads the Commission's forbearance authority as to § 251(c)(3) out of the

[6] *See Qwest Omaha Forbearance Order* ¶ 14 n.48. The D.C. Circuit has frequently affirmed the maxim that, where Congress has explicitly provided a test or a mechanism, there is no basis for inferring a different one. *See, e.g., Geier v. American Honda Motor Co.*, 166 F.3d 1236, 1241 (D.C. Cir. 1999) (noting that, where Congress has explicitly addressed pre-emption, there is no need to infer congressional intent to preempt) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)); *American Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984) ("[W]hen Congress has provided a mechanism capable of rectifying mistaken actions, . . . it is not reasonable to infer authority to reconsider agency action."). The Commission is entitled to deference for its interpretation of § 160. *See Cellular Telecomms. & Internet Assn. v. FCC*, 330 F.3d 502, 504, 507 (D.C. Cir. 2003).

statute.[7] This is because the Commission cannot order unbundling in the first instance where there is no impairment. *See, e.g.*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 571-72, 574 (D.C. Cir.) ("*USTA II*"), *cert denied*, 125 S. Ct. 313, 316, 345 (2004). As the D.C. Circuit held in *USTA II*, forbearance from UNE obligations "obviously comes into play *only* for [unbundling] requirements that exist." *Id.* at 579-80 (emphasis added).

Therefore, it cannot be the case, as these commenters claim, that the Commission is permitted to forbear from UNE requirements only after those requirements no longer exist. At that point, there would be nothing for the Commission to forbear from enforcing. The D.C. Circuit, moreover, has held that Congress "established § 1[6]0 as a viable and *independent* means of seeking" relief from regulatory requirements and that the Commission "has no authority to sweep . . . away" forbearance simply because there is "another, very different, regulatory mechanism" — here, a rulemaking finding no impairment under § 251(d)(2) — that could be used to eliminate the regulatory requirements. *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) (emphasis added). If Congress had meant for § 251(c)(3) to be exempt from forbearance, it would have said so expressly — but it did not do so. And what Congress did say in § 160(d) — limiting grants of forbearance from § 251, including § 251(c)(3), until that section is "fully implemented" — makes clear that Congress gave the Commission authority to forbear from enforcing the UNE requirements in § 251(c)(3) once it finds, as it has, that the condition in § 160(d) has been satisfied.

[7] *See, e.g.*, *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) ("This Court will not adopt an interpretation of a statute or regulation when such an interpretation would render the particular law meaningless.").

B. Under § 160(a)(1), the Only Question Is Whether the Regulation at Issue Is Necessary To Ensure Just and Reasonable Rates

In § 160(a)(1), Congress established specific criteria governing the Commission's considering of the effect of forbearance on a carrier's rates. The question the Commission must consider is whether "enforcement of [the] regulation or provision [that is the subject of the forbearance request] is not necessary to ensure that the charges . . . by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). There is no basis in the statute to require the Commission to make any additional findings — beyond those on the face of § 160(a)(1) — before concluding that the requirements of this section are satisfied.

1. Nonetheless, GCI claims that forbearance cannot be granted if the rates ACS would charge following the grant of forbearance are higher than the TELRIC rates that ACS currently must charge for UNEs under this Commission's regulations. *See* GCI at 42-44. As an initial matter, GCI loses sight of the fact that, as the Commission has recognized, "[c]onsumers are and should be the ultimate beneficiary."[8] This is true of both the 1996 Act generally and of the Act's forbearance provisions in particular, which require the Commission to consider the rates paid by and the protection of "consumers," rather than the parochial interests of particular competitors. 47 U.S.C. § 160(a)(1)-(2). In this respect, § 160 reflects the basic antitrust principle that government regulation of the marketplace is "for the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal quotation marks omitted). For these reasons, any effect that forbearance might have on

[8] Recommended Decision, *Federal-State Joint Board on Universal Service*, 16 FCC Rcd 6153, 6195 (2000).

wholesale rates for other carriers is relevant to the analysis under § 160 only to the extent that it affects retail competition and the rates paid by consumers.

In any event, nothing in § 160 provides that forbearance is warranted only where market rates will precisely equal the rates that had prevailed under the regulatory regime that was the subject of the forbearance petition. Nor is there any reason to expect that such a result will ever occur. That is especially true with respect to TELRIC rates, which are expressly designed to reflect a *hypothetical* (rather than actual) market.

The Commission, moreover, has made clear that, except in the limited context of § 251(c)(3), the statutory standard of "just and reasonable" rates — the hallmark of § 160(a)(1) — is *not* TELRIC. For example, in the context of elements that are subject only to § 271 and, therefore, to the just and reasonable standard in § 201, the Commission has held that "it would be *counterproductive* to mandate that the incumbent offer[] the element at forward-looking prices" and that, instead, "the *market price* should prevail, as opposed to a regulated rate."[9] The Commission reiterated that finding in the *Triennial Review Order*, holding that TELRIC pricing for 271 elements "is neither mandated by statute nor necessary to protect the public interest." *Triennial Review Order* ¶ 656; *see id.* ¶ 657 ("section 252(d)(1) is quite specific that it only applies for the purposes of implementation of section 251(c)(3) — meaning only where there has been a finding of impairment with regard to a given network element"). That is because requiring TELRIC pricing in such contexts has the effect of "undermin[ing] the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology." *Id.* ¶ 3.

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[9] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 473 (1999) (emphases added), *vacated and remanded*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

The D.C. Circuit has upheld the Commission's determinations in these regards. The D.C. Circuit has recognized that mandated unbundling at TELRIC rates "imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *USTA I*, 290 F.3d at 427. That court found further that there is "no serious argument" that the "§ 251 pricing rules apply" outside the context of § 251(c)(3). *USTA II*, 359 F.3d at 589. Moreover, the Court found that there is "nothing unreasonable in the Commission's decision to confine TELRIC pricing to the instances where it has found impairment" and continues to require unbundling of elements under § 251(c)(3). *Id.*

For all of these reasons, carriers have no right under § 160 to continued application of TELRIC rates where the Commission finds that § 160(a) factors are satisfied, and it is entirely consistent with the statutory text for rates to rise above TELRIC following a grant of forbearance

2. GCI, Comptel, and Integra also claim that the Commission cannot grant forbearance from enforcement of § 251(c)(3) unless § 271 is available to provide a "backstop" of rate regulation. *See* GCI at 46, 49-51, 69; Comptel at 12-14; Integra at 3-4. In support of these claims, they note that the Commission declined in the *Qwest Omaha Forbearance Order* to forbear from enforcing § 271 requirements as to those elements for which it granted forbearance under § 251(c)(3). *See Qwest Omaha Forbearance Order* ¶ 100. But the Commission did not hold in that order that the existence of § 271 obligations was a *necessary prerequisite* to its grant of forbearance from enforcing § 251(c)(3). Instead, the Commission made clear that it was deciding only that, in the specific circumstances of Qwest's petition where it relied "in part on the continued applicability of Qwest's wholesale obligations" under § 271 in granting forbearance from § 251(c)(3), it would not also grant forbearance from checklist items 4, 5, and 6. *Id.* ¶ 105.

In addition, these commenters' interpretation of § 160 must be rejected because it would have the effect of denying *all* non-BOCs the right to obtain forbearance from any § 251(c)(3) obligations, as those carriers are not subject to § 271.[10] Such a significant limitation on the Commission's forbearance authority can be found nowhere in the statute. On the contrary, Congress took care to establish specific exceptions to the Commission's forbearance authority in the UNE context, enumerated in § 160(d), such as the requirement that § 251 be "fully implemented" before the Commission can forbear from enforcing its requirements. Where Congress makes such explicit exceptions, there is no basis for reading into the statute an implicit exception for non-BOCs. *Cf. Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176-77 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so. . . . If . . . Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text."); *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929, 937 (D.C. Cir. 1995) ("Because Congress knew how to state that it was establishing an advisory committee and did not do so here, the reasonable inference is that it did not intend for FACA to apply to guideline panels."). This is particularly true in the context of the 1996 Act, which this Commission has recognized imposes greater requirements on BOCs than on other ILECs.[11]

Finally, the claim that a regulatory "backstop" is necessary before forbearance from enforcement of § 251(c)(3) can be granted is, itself, inconsistent with the premise underlying

[10] That is because non-BOC ILECs had no obligation to seek authority under § 271 before providing in-region interLATA services. *See* Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, ¶ 8 (2001) ("We also note that the Act does not require Verizon to make a showing of checklist compliance with respect to the former GTE operating company it acquired in Pennsylvania in order to obtain section 271 authorization for this state."), *aff'd*, *Z-Tel Communications, Inc. v. FCC*, 333 F.3d 262 (D.C. Cir. 2003).

[11] *See, e.g.*, *Triennial Review Order* ¶ 655; *Qwest Omaha Forbearance Order* ¶ 54.

Congress's creation of the forbearance requirement. When the Commission forbears from enforcing a particular provision, it by definition has found that competition will ensure just and reasonable rates, without the need for regulation. The fact that the Commission's refusal to forbear from § 271 in the *Qwest Omaha Forbearance Order* meant that there was a regulatory backstop in *that case*, hardly means that the Commission cannot grant forbearance in the absence of such a backstop.

C. Forbearance Does Not Require the Presence of Multiple Competitors

When presented with a forbearance petition, the fundamental question before the Commission is whether "market conditions" and "market forces" are sufficient to ensure that rates will be just and reasonable and that consumers will be protected in the absence of regulation, such that forbearance is in the public interest.[12] That is because § 160 is designed to benefit consumers by promoting competition, and does not protect any particular class of competitors.

For this reason, there is no merit to commenters' claims that a petition for forbearance necessarily fails unless the petitioner can demonstrate the presence in the market of *multiple* competitors with significant market shares. *See, e.g.*, Time Warner Telecom at 7-11; Integra at 5-6; Talk America at 1-2.[13] The Commission and the D.C. Circuit have already rejected arguments identical to those that these commenters raise. In *USTA I*, for example, the court chastised the Commission for failing to take account of the "robust competition" from cable

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[12] Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Personal Communication Industry Association's Broadband Personal Communications Services Alliance Petition for Forbearance*, 13 FCC Rcd 16857, ¶ 18 (1998).

[13] To the extent that Time Warner Telecom (at 7-8) claims that multiple competitors are necessary for a finding of no impairment and, therefore, for a grant of forbearance, it repeats its erroneous claim that the impairment analysis controls the Commission's analysis of a petition for forbearance from enforcement of § 251(c)(3). *See supra* Part II.A.

modem providers in the broadband market, and for considering only the question whether particular competing local exchange carriers could economically provide DSL without UNE access to incumbents' networks. *USTA I*, 290 F.3d at 428-29. And, in *USTA II*, the court upheld the Commission's decision not to require incumbents to unbundle broadband loops where "intermodal competition in broadband, particularly from cable companies, means that, even if CLECs proved unable to compete with ILECs in the broadband market, there would still be vigorous competition from other sources." *USTA II*, 359 F.3d at 580-81. The D.C. Circuit's decisions thus confirm that the key question under the 1996 Act is whether *competition* is furthered, rather than the interests of a particular class of competitors. This analysis is in line with the focus in § 160 on the protection of *consumers* — which occurs through furthering of competition, not individual competitors.

The Commission has likewise rejected the argument, which commenters repeat here, that facilities-based competition between incumbents and a cable operator is an impermissible "duopoly." Indeed, the Commission's recent decision to grant forbearance to Qwest based on the fact that Qwest faced a significant competitive threat from a single cable provider (Cox) demonstrates the error in these commenters' claim. *See Qwest Omaha Forbearance Order* ¶¶ 1-2, 71; *see also 271 Broadband Forbearance Order* ¶ 28 (rejecting arguments that "a fully competitive wholesale market is a mandatory precursor to a finding that [§ 160(a)(1)] is satisfied, regardless of the state of intermodal competition").

Finally, the commenters making this claim continue to ignore, as they have in the past, the existence of additional, viable intermodal competitors, such as wireless and non-facilities-based VoIP providers. The Commission, by contrast, has taken such competition into account, consistent with the D.C. Circuit's mandate in *USTA I*. *See, e.g., 271 Broadband Forbearance*

Order ¶ 28 n.88 (citing Second Report and Order, *Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1467-68, 1470-72, ¶¶ 138, 146-54 (1994) (concluding that the market need not be "fully competitive" to permit forbearance under § 332(c)(1)(A) and describing constraints — including intermodal competition — on anti-competitive practices by duopoly providers)). The Commission likewise considered the presence of competitors offering viable intermodal substitutes in the order approving the merger of Verizon and MCI.[14]

As in the Qwest forbearance proceeding, the critical question is whether competitive substitutes exist in Anchorage and are developing rapidly, not — as some commenters suggest — the market share to date that such substitutes have achieved. In the *Qwest Omaha Forbearance Order*, the Commission relied on the fact that the leading competitive alternative was "capable of delivering" services to a certain percentage of customers, not that it had already obtained any particular market share. *Qwest Omaha Forbearance Order* ¶ 66; *see id.* ¶ 69. Similarly, the Commission has recently recognized, as economists long have, that an intermodal alternative will constrain a carrier's prices even when it is not the case that all "consumers would be willing or able to substitute" the intermodal service for wireline service, "or even that [the intermodal service] be widely available"; instead, it is enough that there is "*sufficient* substitution for significant segments of the mass market."[15] This approach is entirely consistent with the text

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[14] *See* Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, FCC 05-184, WC Docket No. 05-75, 20 FCC Rcd 18433, ¶ 77 (rel. Nov. 17, 2005) ("*Verizon/MCI Merger Order*") ("find[ing] that intermodal competition from cable telephony, mobile wireless service providers, and providers of certain VoIP services will likely continue to provide these customers with viable alternatives"); *id.* ¶ 91.

[15] *Verizon/MCI Merger Order* ¶¶ 88, 91 (emphasis added); *see* Reply Declaration of Robert W. Crandall and Hal J. Singer, Attach. H to Reply Comments of Verizon, CC Docket No. 01-338, WC Docket No. 04-313, ¶ 6 (FCC filed Oct. 19, 2004) (explaining that that it is not necessary for all consumers to perceive competitive substitutes as "*perfectly* fungible" to

of § 160, which makes no mention of a "market share" test.[16] In another context, moreover, the D.C. Circuit rejected the Commission's attempt to impose a market share test, noting that the Commission had "never viewed market share as an *essential* factor." *AT&T Corp.*, 236 F.3d at 736.

D. The Commission Cannot Simply Disregard the *Qwest Omaha Forbearance Order* in This or Future Forbearance Proceedings

In the *Qwest Omaha Forbearance Order*, the Commission acknowledged that its decision to grant forbearance to Qwest from § 251(c)(3) for certain elements in some wire centers was based on the specific facts in that record. *See Qwest Omaha Forbearance Order* ¶ 2 n.4 ("This proceeding considers factors unique to the Omaha MSA."); ¶ 14 n.46. Some commenters, however, willfully misread those statements in asserting that incumbents are precluded from even citing the *Qwest Omaha Forbearance Order* when they file future petitions for forbearance. *See* Covad at 36-37; Nuvox at 31-32.

These claims miss the mark. While the Commission must judge each petition for forbearance on its unique facts, it is a basic principle of administrative law that agencies are bound by the legal conclusions that they adopt in their precedents and, therefore, are obligated to distinguish those determinations and explain their reasons for any change of course if they depart from them. *See, e.g.*, *WorldCom, Inc. v. FCC*, 238 F.3d 449, 460 (D.C. Cir. 2001) (holding that when an agency changes course, it must explain the departure); *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1201-02 (D.C. Cir. 1996) (same). Nothing in the *Qwest Omaha Forbearance Order*

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constrain a carrier's prices, but rather that it is enough for "a sufficient share of the ILEC's consumers [to] perceive . . . rival technologies to be a viable alternative").

[16] The approach is paralleled in the UNE context, where the Commission expressly "decline[d] to determine impairment based on a certain level of retail competition because section 251(d)(2) requires us to ask whether requesting carriers are 'impaired,' not whether certain thresholds of retail competition have been met." *Triennial Review Order* ¶ 114.

suggests that the Commission was attempting to flout this basic principle or to preclude parties from relying on the legal determinations in that order.

E. Section 160(d) Poses No Bar to this Petition Because the Commission Has Already Found that the Requirements of § 251(c) Have Been Fully Implemented Nationwide

The *Qwest Omaha Forbearance Order* expressly held that "section 251(c) is 'fully implemented' for all incumbent LECs *nationwide*," because "the Commission has issued rules implementing section 251(c) and those rules have gone into effect." *Qwest Omaha Forbearance Order* ¶ 53 (emphasis added). Contrary to the arguments of various parties, that determination should be followed here.[17]

1. Covad and Nuvox, for example, contend that § 251(c)(3) is not fully implemented until September 11, 2006 — the end of the longest period established in the *Triennial Review Remand Order* for elements (dark fiber loops and transport) that the Commission held are *not* required to be unbundled under § 251(c)(3). *See* Covad at 6-7; Nuvox at 5-6. The Commission has already rejected virtually identical claims, holding that the relevant action for purposes of § 160(d) was the Commission's initial "rulemaking activities" implementing § 251. *Qwest Omaha Forbearance Order* ¶ 53. That is because, as the Commission found, § 160(d) left it *to the Commission* "to determine when the requirements of section 251(c) have been fully implemented." *Id.* ¶ 53 n.133. The Commission's interpretation of § 160(d), moreover, is subject to considerable deference. *See generally Cellular Telecomms.*, 330 F.3d at 504, 507 (holding that the Commission is entitled to deference in its interpretation of § 160).

[17] To the extent that parties simply dispute the Commission's holdings in that order, the proper way to raise such claims would have been by filing petitions for reconsideration of that order. These commenters did not do so, and the Commission should not entertain their belated collateral attacks in this proceeding.

In any event, the regulatory periods relied on by the commenters, by definition, impose obligations that *go beyond* the requirements of § 251(c)(3). The Commission's no impairment findings for dark fiber mean that it cannot mandate unbundling of those elements under § 251(c)(3) *today*, not at the end of the periods. Because CLECs' continued ability to obtain access to their embedded base of dark fiber arrangements is not based on § 251(c)(3), the end date of that obligation cannot establish the date on which § 251 is "fully implemented."

2. Nuvox asserts (at 33) that it cannot be the case that Congress permitted the Commission to "determine" whether it has "fully implemented" the requirements of § 251(c)(3). But, as the Commission has previously explained, while § 271(d)(3)(A)(i) requires the "Commission . . . [to] find[]" that a "Bell operating company" has "fully implemented the competitive checklist" before the Commission grants a § 271 application, there is no comparable provision of § 251.[18] Instead, § 251(d)(1) requires "the Commission" alone to take "all actions necessary" to establish the rules and regulations that "implement the requirements" of § 251. 47 U.S.C. § 251(d)(1). It was reasonable for the Commission to conclude, based on this different statutory language, that it is the Commission, through its rulemaking, that does the "implementing" of § 251 that § 160(d) requires as a prerequisite for forbearance. *See Qwest Omaha Forbearance Order* ¶¶ 53-54.

Along the same lines, McLeodUSA (at 3-4) claims that the Commission's interpretation is improper because it would have allowed the Commission to abolish unbundling requirements as early as the adoption of its unbundling rules in August 1996. Contrary to McLeodUSA's claim, the "abolishment" of unbundling requirements is not at issue; rather, the question is whether § 160(d) prevents the Commission from forbearing from enforcement of the

[18] *See Qwest Omaha Forbearance Order* ¶ 54; *see also 271 Broadband Forbearance Order* ¶ 16.

requirements of § 251 when the criteria in § 160(a) are satisfied. That is because § 160(d) is merely a *threshold* requirement. Without a finding that § 251(c) is fully implemented, the Commission may not forbear even if it finds that the criteria in § 160(a) are satisfied — which in normal circumstances would *compel* the Commission to grant a forbearance petition or to forbear on its own motion. *See* 47 U.S.C. § 160 ("the Commission shall forbear" if it finds the requirements of § 160(a) are satisfied). Therefore, even where § 251(c) *has* been fully implemented — as the Commission has determined is the case nationwide — a grant of forbearance still requires findings that the § 160(a) factors have been met. McLeodUSA has no basis for presuming that the Commission would have granted forbearance petitions in 1996 or 1997 *without* the requisite showing that the § 160 criteria were satisfied. Nor does McLeodUSA give any reason why Congress would have wanted the § 251 obligations to remain in place, even as early as 1996, if it turned out that they were *not* necessary for the protection of consumers or to ensure just and reasonable rates, and if forbearance was in the public interest.

3. McLeodUSA also argues that the Commission's interpretation does not give effect to the word "fully" in the phrase "fully implemented," because § 251(d)(1) only uses the word "implement." McLeodUSA at 6. This claim ignores the structure of § 251. As noted above, § 251(d)(1) requires the Commission to take "all actions necessary" to "implement" § 251. Once the Commission has taken "*all actions necessary*," there can be no further actions necessary to implement § 251 "fully." This is supported by the fact that § 251(d)(1) establishes a six-month deadline for completing all of those actions necessary to implement § 251, but at the same time provides no consequences if the Commission had not met that deadline. If that had happened, parts of § 251 would have been implemented, but § 251 itself would not have been *fully* implemented because the Commission would not yet have completed "all actions necessary." Moreover, no other provision of § 251 speaks to implementation of that section or suggests that, after the Commission has taken "all actions necessary," the implementation of § 251 is anything less than full.

CONCLUSION

The Commission should grant ACS's petition in a manner consistent with the foregoing comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 23rd day of February 2006, I caused a copy of the foregoing Reply Comments of Verizon on ACS's Petition for Forbearance to be served upon the parties on the service list below by first-class mail, postage prepaid.

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